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No. 98-1369

In the Supreme Court of the United States

OCTOBER TERM, 1998

JOSEPH JAMES BURKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1388

QUESTION PRESENTED

Whether a defendant may collaterally attack his sentence under 28 U.S.C. 2255 (1994 & Supp. III 1997) based on a subsequent clarifying amendment to the applicable Sentencing Guideline.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 152 F.3d 1329. The opinion of the district court (Pet. App. 13a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1998 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on December 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1988, following the entry of a plea of guilty, petitioner was convicted in the United States District

Court for the Middle District of Florida on six counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). As to four of the counts, the district court sentenced petitioner under pre-Sentencing Guidelines law to 25 years' imprisonment. On the two remaining counts, the court sentenced petitioner under the Guidelines to 63 months' imprisonment, to be served consecutively to the pre-Guidelines sentence and to be followed by five years' supervised release. Petitioner filed a notice of appeal, but the appeal was ultimately dismissed on petitioner's motion. Pet. App. 2a-3a; Gov't C.A. Br. 1.

In 1997, petitioner sought collateral relief under 28 U.S.C. 2255 (1994 & Supp. III 1997) based on a clarifying amendment to the Guidelines that took effect on November 1, 1990. The district court denied collateral relief, Pet. App. 13a-15a, and the court of appeals affirmed, *id.* at 1a-10a.

1. Petitioner pleaded guilty to committing six armed robberies between June and December of 1987. Presentence Report (PSR) ¶ 1. Two of the robberies took place after November 1, 1987, and petitioner accordingly was sentenced under the Guidelines for those counts. *Ibid.* The PSR recommended that petitioner's offense level be increased by two levels for obstruction of justice under Guidelines § 3C1.1. That recommendation rested on evidence that petitioner remained a fugitive for more than six months, knowing that the FBI was pursuing him, and that petitioner possessed false identification at the time of his arrest. Gov't C.A. Br. 2-3; PSR ¶¶ 19, 26. Petitioner did not object to the enhancement at sentencing, and the district court adopted the PSR's factual findings and guideline calculations. Gov't C.A. Br. 3 n.4. Petitioner's final offense level of 24, combined with criminal history category I,

yielded a sentencing range of 51-63 months' imprisonment. PSR ¶¶ 34, 36, 48. The court sentenced petitioner to 63 months' imprisonment. Gov't C.A. Br. 1. Petitioner filed a notice of appeal, which he later moved to dismiss. *Ibid.*

2. Two years after petitioner's convictions became final, the Sentencing Commission amended Guidelines § 3C1.1 and its accompanying commentary to "clarif[y] the operation of § 3C1.1." Guidelines, App. C, Amend. 347. Among other things, Amendment 347 added a new application note, which provided in relevant part:

> 4. The following is a non-exhaustive list of examples of the types of conduct that, absent a separate count of conviction for such conduct, do not warrant application of this enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range:
>
> > (a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;
> >
> > * * * * *
> >
> > (d) avoiding or fleeing from arrest (see, however, § 3C1.2 (Reckless Endangerment During Flight)).

Ibid. The amendment took effect November 1, 1990. *Ibid.*

3. On April 18, 1997, petitioner filed a motion for correction of his sentence under 28 U.S.C. 2255. Gov't C.A. Br. 1. Petitioner contended that he was entitled to

be resentenced in light of the Commission's clarifying amendment to Guidelines § 3C1.1, which, he argued, demonstrated that his conduct did not warrant the two-level enhancement. *Id.* at 1-2. In response, the government argued that petitioner's claim was not cognizable on collateral review. Gov't Resp. in Opp. 2-4. The government noted that all of the Eleventh Circuit cases cited by petitioner in which the court remanded for consideration of a guidelines amendment involved direct appeals rather than collateral proceedings, and that the Eleventh Circuit had rejected the reasoning of *Isabel* v. *United States*, 980 F.2d 60 (1st Cir. 1992), which afforded collateral relief based on a guidelines amendment. *Ibid.* The district court denied collateral relief "for the reasons stated in the government's response." Pet. App. 14a.[1] The court of appeals granted petitioner's motion for a certificate of appealability.

4. The court of appeals affirmed the denial of collateral relief. Pet. App. 1a-10a. The court began by noting that nonconstitutional claims are cognizable on collateral review only "when the alleged error constitutes a 'fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.'" Pet. App. 5a-6a (quoting *Reed* v. *Farley*, 512 U.S. 339, 348 (1994)). The court then observed that Amendment 347 is a clarifying amendment that did not substantively change Guidelines § 3C1.1, but rather reflected the Sentencing Commission's original intent on the interpretation of the Guideline. Pet. App. 8a.

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[1] The court also denied petitioner's separate motion for modification of his sentence under 18 U.S.C. 3582(c)(2). Pet. App. 13a-14a. Petitioner did not appeal the denial of that motion.

Petitioner therefore could have objected to the enhancement under Section 3C1.1 at his original sentencing or on direct appeal. *Id.* at 8a-9a. "Considering all of the circumstances," the court of appeals held, "we cannot say that the alleged mis-application of the sentencing guidelines in this case was fundamentally unfair or that it constituted a miscarriage of justice sufficient to form the basis for collateral relief." *Id.* at 9a. Having decided that petitioner's claim was not cognizable under Section 2255, the court expressly declined to decide whether petitioner had made the requisite showing of cause and prejudice to excuse his procedural default in failing to raise the issue at sentencing and on direct appeal. *Id.* at 9a-10a & n.1.

ARGUMENT

Petitioner contends (Pet. 10-14) that this Court should grant review to decide whether a claim of sentencing error in light of a subsequent clarifying amendment to the Sentencing Guidelines is cognizable under 28 U.S.C. 2255 (1994 & Supp. III 1997). That contention lacks merit. The court of appeals in this case correctly held that petitioner's claim does not support a collateral attack on his sentence, and the conflict of authority identified by petitioner does not warrant this Court's attention.

1. "It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979). A non-constitutional "error of law does not provide a basis for collateral attack [under Section 2255] unless the claimed error constitute[s] 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Id.* at 185 (quoting *Hill* v.

United States, 368 U.S. 424, 428 (1962)); see also *Reed* v. *Farley*, 512 U.S. 339, 354 (1994); *Brecht* v. *Abrahamson*, 507 U.S. 619, 634 & n.8 (1993); *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979).

There is general agreement among the courts of appeals that claims of error in the application of the Guidelines "ordinarily are not cognizable" on collateral review. *Grant* v. *United States*, 72 F.3d 503, 505-506 (6th Cir.) (denying Section 2255 motion seeking relief based upon post-sentencing clarifying amendment to Guidelines), cert. denied, 517 U.S. 1200 (1996); see also, *e.g.*, *United States* v. *Payne*, 99 F.3d 1273, 1281-1282 (5th Cir. 1996) (absent miscarriage of justice, newly raised claim of misapplication of Guidelines not cognizable on collateral attack under Section 2255); *Graziano* v. *United States*, 83 F.3d 587, 589-590 (2d Cir. 1996); *Auman* v. *United States*, 67 F.3d 157, 160-161 (8th Cir. 1995) (citing cases); *Knight* v. *United States*, 37 F.3d 769, 773 (1st Cir. 1994); *Scott* v. *United States*, 997 F.2d 340, 341-342 (7th Cir. 1993).

In accordance with that broad consensus, the court of appeals in this case correctly held that petitioner's claim of sentencing error is not cognizable on collateral attack under Section 2255. The sentencing court's imposition of a two-level enhancement under Guidelines § 3C1.1 for petitioner's conduct represented a routine application of the Guidelines and, even if there was error, petitioner's claim "falls short of indicating a 'complete miscarriage of justice.'" Pet. App. 8a. An error that affects only a fact-specific adjustment to a guideline range simply does not present an "exceptional circumstance[] where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Hill*, 368 U.S. at 428 (quoting *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939)).

2. Petitioner contends (Pet. 10) that the Court should grant certiorari to resolve a conflict between this case and the First Circuit's decision in *Isabel* v. *United States*, 980 F.2d 60 (1992). Like petitioner here, the defendant in *Isabel* sought relief under Section 2255 on the ground that Amendment 347 to the Guidelines made clear that his sentence had improperly been enhanced for obstruction of justice under Guidelines § 3C1.1.[2] The court of appeals in *Isabel*, without citing a single case concerning the standards for availability of collateral relief, held that Isabel was entitled to have his sentence reconsidered. In so concluding, the court stated that it would "follow th[e] uniform approach" of the circuits that had held that "it is appropriate to consider post-sentencing amendments that clarify but do not substantively change [a] guideline." *Isabel*, 980 F.2d at 62. Each of the cases the First Circuit cited to exemplify that "uniform approach," however, involved direct rather than collateral review. See *id.* at 62, 63. *Isabel* is therefore not a sound precedent.

The conflict petitioner identifies does not warrant this Court's attention for several reasons. First, *Isabel* appears to be an anomaly in the First Circuit's collateral-review jurisprudence. In *Knight*, 37 F.3d at 773, for example — a case decided after *Isabel* — the First Circuit held that a defendant's claims of sentencing error were not cognizable under Section 2255 because they "f[e]ll far short of the 'miscarriage of justice' standard." 37 F.3d at 773. Unlike *Isabel*, *Knight* properly cited and applied the standards governing the availability of collateral relief as estab-

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[2] Unlike petitioner in this case, Isabel objected to the enhancement at sentencing, although he did not raise the claim on direct appeal. See 980 F.2d at 61 & n.2.

lished in this Court's cases. *Id.* at 772-773. The First Circuit has subsequently cited *Knight* for the proposition that "errors in the application of the sentencing guidelines, by themselves, are not normally cognizable on collateral attack." *Smullen* v. *United States*, 94 F.3d 20, 23 n.3 (1st Cir. 1996). See also *United States* v. *Dupont*, 15 F.3d 5, 6-7 (1st Cir. 1994) (government's failure to produce prior statements of witnesses testifying at sentencing would not warrant collateral relief absent showing of miscarriage of justice); *Padilla Palacios* v. *United States*, 932 F.2d 31, 35 (1st Cir. 1991) (sentencing court's imposition of term of post-confinement monitoring did not warrant collateral relief where any error did not result "in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure' "). By contrast, we have found no case in which the First Circuit has relied on *Isabel* to support a grant of collateral relief.[3]

Second, even if this Court were to hold that his claim is cognizable on a Section 2255 motion, petitioner would

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[3] Although petitioner does not cite the decision, we note that the Sixth Circuit also recently held that a post-sentencing clarifying amendment could form the basis for a collateral attack on a guidelines sentence. See *Jones* v. *United States*, 161 F.3d 397 (6th Cir. 1998). The result in *Jones*, however, rests on a misunderstanding of this Court's decision in *Davis* v. *United States*, 417 U.S. 333, 346 (1974), which held that collateral relief was available where a post-conviction change in law established that a defendant's "conviction and punishment [were] for an act that the law does not make criminal." The result in *Jones*, moreover, conflicts directly with the Sixth Circuit's prior decision in *Grant*, 72 F.3d at 505-506. The United States has therefore petitioned for rehearing en banc in *Jones*, and the Sixth Circuit has directed the defendant to file a response. Because there is a possibility that the Sixth Circuit will vacate *Jones*, that decision does not support a grant of certiorari in this case.

not be entitled to relief because his claim is procedurally defaulted. See *Sunal* v. *Large*, 332 U.S. 174, 178 (1947) ("the writ of *habeas corpus* will not be allowed to do service for an appeal"). Petitioner failed to object at sentencing to the imposition of an enhancement under Guidelines § 3C1.1, and he failed to raise the issue on direct appeal. Under well-settled principles, therefore, petitioner could obtain collateral relief only if he demonstrated "cause" for his waivers, and actual prejudice from the error he alleges. See *Bousley* v. *United States*, 118 S. Ct. 1604, 1611 (1998); *Reed* v. *Farley*, 512 U.S. at 354; *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982). Petitioner himself argues (*e.g.*, Pet. 10), however, that Amendment 347 is merely "clarifying," meaning that the Sentencing Commission did not effect a substantive change in Guidelines § 3C1.1. Even without the amendment, therefore, petitioner could have argued to the sentencing court and on direct appeal that his conduct did not constitute an obstruction of justice within the meaning of the Guideline. See Pet. App. 8a-9a; *Grant*, 72 F.3d at 506 ("Insofar as [Guidelines] amendment 439 is a clarifying amendment, as it purports to be, [the claim of error] was available to petitioner at the time of her sentencing."). That argument would not have been "so novel that its legal basis [wa]s not reasonably available to counsel." *Bousley*, 118 S. Ct. at 1611 (quoting *Reed* v. *Ross*, 468 U.S. 1, 16 (1984)). Accordingly, petitioner would be unable to show cause for his default.[4]

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[4] There is no merit to petitioner's contention (Pet. 12-13) that the decision in this case further conflicts with *Isabel* on the "cause" issue. *Isabel* did not squarely address *Frady*'s "cause and prejudice" standard, but merely noted in passing that Isabel could not have waived reliance on Amendment 347 on direct review because the amendment did not take effect until after his appeal was filed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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See *Isabel*, 980 F.2d at 61 n.2. And the court of appeals in this case did not address the issue at all, simply noting that petitioner failed even to "allege or assert cause and prejudice before the district court and raised it for the first time in his reply brief" in the court of appeals. Pet. App. 10a n.1.